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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DARYL LYNCH, Defendant and Appellant.	B232245 (Los Angeles County Super. Ct. No. BA349702)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Daryl Lynch appeals from the judgment entered following a jury trial that resulted in his convictions for first degree felony murder, carjacking and attempted carjacking, second degree robbery, and evading an officer, causing death. The trial court sentenced Lynch to life in prison without the possibility of parole. Lynch contends the evidence was insufficient to support the jury's special circumstance findings, as well as his convictions for murder, attempted carjacking, and robbery; the People improperly alleged special circumstances in conjunction with a felony-murder theory; and his sentence constitutes cruel and unusual punishment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's evidence.*

At approximately 11:15 a.m. on November 27, 2008, Thanksgiving Day, Lorene Simpson and her boyfriend, Charles Hart, drove to a Von's Market in Lincoln Heights in Hart's four-door Jeep Liberty and parked in the market's parking lot. Hart went inside the Von's store, taking the Jeep's keys with him, while Simpson and her two dogs waited outside in the Jeep. The Jeep's left back window was half open; the other windows were "cracked" to allow for air circulation. The doors were unlocked.

Appellant Lynch, who was 19 years old, was "standing around" in a corner of the parking lot, alone. When Hart entered the store, Lynch approached the passenger side of the Jeep where Simpson was seated and jiggled the handle of the door, attempting to enter the car. Simpson quickly locked the doors. Lynch then walked to the driver's side of the vehicle, reached through the half-open back window, unlocked the driver's side door, and reached in and felt around the ignition as if searching for the car keys. Simpson exited the Jeep and screamed for Lynch to get away from the car. Lynch ignored her and continued looking for the keys. He picked up Hart's iPhone, which was on the driver's seat. Simpson continued screaming and threw a soft drink that she had been holding at Lynch. Lynch threw the iPhone to the ground and moved away from the

Jeep. Hart ran to the center of the parking lot and "screamed for help at the top of [her] lungs."

Meanwhile, Raymond Ardiles had been in the Von's store, unsuccessfully attempting to cash some checks. He had left his white Toyota Corolla in the Von's parking lot. When he returned to his car, he placed the keys in the ignition and the checks he had attempted to cash in the car. He heard Simpson screaming and observed Lynch attempting to enter the Jeep, which was parked approximately three spaces away from his Corolla.

Lynch turned his attention to Ardiles, who was at that point on the telephone with his girlfriend. Lynch looked toward Ardiles and walked to the passenger side of the Corolla. He punched the passenger side window as if trying to break it. He then walked to the driver's side of the Corolla, opened the door, pulled Ardiles from the car, punched Ardiles in the back of the head, and drove away, almost striking Ardiles with the car as he fled. Lynch sped from the parking lot, driving erratically, while Ardiles chased him on foot while at the same time calling 911. Simpson also called 911.

Los Angeles Police Officer John Talbot, who was on patrol on his motorcycle, was busy issuing a ticket to a motorist at the intersection of Hill Street and Olympic Boulevard. Talbot heard the sound of a vehicle being driven at an excessive speed. He looked up and saw Lynch speeding in Ardiles's Corolla, driving approximately 60 miles per hour in a 35-mile-per hour zone. Lynch ran a red light and nearly hit several pedestrians, who had to jump back to avoid the Corolla. Officer Talbot aborted writing the ticket, mounted his motorcycle, and followed Lynch. In accordance with departmental policy, he did not activate his siren or lights at that point. He observed Lynch make additional traffic violations. When Lynch slowed to make a turn and became stuck behind slower traffic, Talbot caught up to him, turned on his lights, and "chirped" his siren. Lynch was sitting very low in his seat; only part of Lynch's head was visible through the rear window. Lynch did not stop but instead ran another red light at Grand and Venice, and then ran a stop sign at Hope and Venice. Officer Talbot

honked his air horn. Lynch sat up abruptly and looked at Talbot over his shoulder. It appeared to Talbot that Lynch had not seen him until that point.

Lynch slowed and eventually stopped at 15th and Hope Streets. As Officer Talbot dismounted from his motorcycle to make the traffic stop, Lynch rapidly accelerated away from the curb, ran another stop sign, and continued to accelerate. Talbot got back on his motorcycle and continued chasing Lynch.

Meanwhile, Tyrone Tucker and his girlfriend, Karen George, were driving westbound on Pico Boulevard in Tucker's Oldsmobile, en route to do errands. Tucker was driving and George was seated in the front passenger seat. As Tucker drove through the intersection at Pico and Hope Streets on a green light, Lynch ran the red light and the Corolla collided with Tucker's Oldsmobile, "T-boning" the Oldsmobile's driver's side door. The impact threw Tucker on top of George and pushed the Oldsmobile onto the sidewalk.

Lynch attempted to open the Corolla's door, but it was jammed shut. He began crawling out the window but was detained by Officer Talbot. Lynch admitted the car was stolen. Ardiles's checks were in Lynch's pocket. Ardiles subsequently identified Lynch as the person who took his car.

George was transported to the hospital, where she was treated for serious injuries but survived. Tucker died at the scene from injuries sustained in the accident.

b. *Defense evidence.*

The parties stipulated that Lynch's blood tested negative for drugs or alcohol.

2. *Procedure.*

Trial was by jury. Lynch was convicted of first degree murder (Pen. Code, § 187, subd. (a),[1] carjacking (§ 215, subd. (a)), second degree robbery (§ 211), evading an officer causing death (Veh. Code, § 2800.3, subd. (b)), and attempted carjacking (§§ 664, 215, subd (a)). The jury found the murder was committed while Lynch was engaged in

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[1] All further undesignated statutory references are to the Penal Code.

immediate flight after having committed and attempted to commit carjacking and robbery (§ 190.2, subd. (a)(17)), and that Lynch personally inflicted great bodily injury upon George (§ 12022.7, subd. (a)). The trial court sentenced Lynch to life in prison without the possibility of parole.[2] It ordered Lynch to pay victim restitution and imposed a restitution fine, a suspended parole restitution fine, court security fees, and a criminal assessment fee. Lynch appeals.

DISCUSSION

1. *Sufficiency of the evidence.*

a. *Standard of review.*

When determining whether the evidence was sufficient to sustain a criminal conviction, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66; *People v. Carrington* (2009) 47 Cal.4th 145, 186-187; *People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The same standard applies when we assess the sufficiency of the evidence supporting a special circumstance allegation, and when the conviction is based primarily upon circumstantial evidence. (*People v. Zamudio, supra*, at p. 357; *People v. Valdez* (2004) 32 Cal.4th 73, 104-105; *People v. Maury* (2003) 30 Cal.4th 342, 396.)

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[2] Sentence on counts 2 through 5 was stayed pursuant to section 654. Sentence on count 6 was ordered to run concurrent to the life term. The court struck the allegation that Lynch had suffered a prior "strike" conviction.

b. *Sufficient evidence supported the felony-murder conviction and the special circumstance allegations.*

As noted *ante*, Lynch was prosecuted for murder under a felony-murder theory. The jury found true the special circumstance allegations that the killing occurred while Lynch was "engaged in immediate flight after having committed and attempted to commit" the crimes of carjacking and robbery. Lynch contends the evidence was insufficient to support the jury's true findings on the special circumstance allegations and his conviction under a felony-murder theory because the robbery and carjacking had ended before the killing occurred. We disagree.

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) A murder "committed in the perpetration of, or attempt to perpetrate" carjacking or robbery is murder of the first degree. (§ 189.) When the prosecution establishes that a defendant killed while committing one of these felonies, " ' "by operation of the statute the killing is deemed to be first degree murder as a matter of law." ' [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1175.) The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit. (*People v. Farley* (2009) 46 Cal.4th 1053, 1121.) Thus, the required mental state for felony murder is the specific intent to commit the underlying felony. (*People v. Booker* (2011) 51 Cal.4th 141, 175; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140-1141.)

A "killing is considered to be committed in the perpetration of the underlying felony if the acts were part of a continuous transaction. [Citation.] No strict causal or temporal relationship between the murder and [the] underlying felony is required." (*People v. Booker, supra*, 51 Cal.4th at p. 175; *People v. Young, supra*, 34 Cal.4th at p. 1175; *People v. Gutierrez, supra*, 28 Cal.4th at p. 1141.) "This transaction may include a defendant's flight after the felony to a place of temporary safety." (*People v. Young, supra*, at p. 1175; *People v. Jones* (2001) 25 Cal.4th 98, 109 ["a murder may be determined to have been committed in the perpetration of a felony if it occurred after the felony, e.g., during the attempt to escape or for the purpose of preventing discovery of the

previously committed felony"].) The same holds true for a felony-murder special circumstance. (*People v. Dykes* (2009) 46 Cal.4th 731, 761, fn. 5; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 87.)

Robbery is the felonious taking of personal property in the possession of another, from his or her person or immediate presence, and against his or her will, accomplished by means of force or fear, with the specific intent to permanently deprive the person of the property. (§ 211; *People v. Burney* (2009) 47 Cal.4th 203, 234; *People v. Gomez* (2008) 43 Cal.4th 249, 254.) The crimes of robbery or attempted robbery are not complete until the perpetrator reaches a place of temporary safety. (*People v. Young, supra,* 34 Cal.4th at p. 1177; *People v. Wilson* (2008) 43 Cal.4th 1, 17; *People v. Keith* (1975) 52 Cal.App.3d 947, 953.) "A fleeing robber's failure to reach a place of temporary safety is sufficient to establish the continuity of the robbery within the felony-murder rule." (*People v. Johnson* (1992) 5 Cal.App.4th 552, 561.)

Carjacking is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the car, accomplished by means of force or fear. (§ 215; *People v. Medina* (2007) 41 Cal.4th 685, 693.) Carjacking is a " 'direct offshoot of robbery.' " (*People v. Medina, supra,* at p. 697; see also *In re Travis W.* (2003) 107 Cal.App.4th 368, 376.) The "taking" element of carjacking has the same meaning as in robbery, that is, possession and asportation. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1054-1055.) Accordingly, the crime of carjacking, like robbery, continues until the perpetrator reaches a place of temporary safety.

Here, the evidence was sufficient to support the jury's findings that the killing occurred during Lynch's commission of the carjacking, attempted carjacking, and robbery. Several cases inform our analysis. In *People v. Russell* (2010) 187 Cal.App.4th 981, a case much like this one, defendant Russell burglarized a house, stole a car from the garage, and fled the scene in the stolen car. Approximately 10 to 15 minutes later, when

Russell was approximately four miles from the burgled home, an officer observed him running a red light and driving at an excessive speed. (*Id.* at pp. 985-986, 991-992.) Russell led the officer on a high speed chase and eventually crashed into a truck, killing the driver. As here, Russell contended he could not be convicted under the felony-murder rule because the burglary and accident were not part of a continuous transaction. (*Id.* at pp. 987-988.) The appellate court disagreed. It reasoned that the defendant, believing a neighbor had observed him committing the burglary, fled the house; when he spotted the patrol car he feared he would be caught. Russell's "maniacal driving at speeds up to 100-plus miles per hour, placing innocent lives at risk, [spoke] loudly about Russell's fear of apprehension." (*Id.* at p. 992.) From this evidences, the trier of fact could reasonably conclude Russell "had not achieved a place of temporary safety when he began his deadly flight from [the officer]." (*Ibid.*)

Similarly, in *People v. Johnson*, *supra*, 5 Cal.App.4th 552, the defendant committed robberies in San Mateo and fled in a stolen car. He drove a considerable distance, during which time police did not observe or follow him. Eventually an officer attempted to pull him over. Rather than stopping, the defendant led the officer on a high speed chase. During the chase, the defendant hit another car, killing the driver. The accident occurred 30 minutes after the defendant fled the robbery scene, and 22 miles away from the robbery location. (*Id.* at p. 562.) *Johnson* concluded that "the defendant, 30 minutes away from the robbery and not having been pursued for the vast bulk of his travels, was nonetheless in flight and thus the homicide and robbery were part of a continuous transaction." (*People v. Russell*, *supra*, 187 Cal.App.4th at p. 991; *People v. Johnson*, *supra*, at pp. 561-562.)

In *People v. Kendrick* (1961) 56 Cal.2d 71, the defendant robbed a market and drove away on the highway. Approximately 48 minutes later, a police officer observed him speeding and pulled him over. (*Id.* at p. 89.) When the officer approached the car, the defendant shot and killed him. The Supreme Court concluded instructions on felony-murder were proper despite the temporal and geographic distance between the robbery and the murder. "[T]he homicide could properly be viewed as committed by defendant in

an endeavor to effect an escape. [¶] 'Robbery, unlike burglary is not confined to a fixed *locus*, but is frequently spread over considerable distance and varying periods of time. The escape . . . with the loot, by means of arms, necessarily is as important to the execution of the plan as gaining possession of the property.' " (*Id.* at pp. 89-90.) Because the homicide was committed while the defendant was "in hot flight with the stolen property and in the belief that the officer was about to arrest him for the robbery," instruction on felony murder was proper. (*Ibid.*)

The instant matter presents even stronger facts than the foregoing cases in support of the finding the crimes at the market and the killing were part of a continuous transaction. After committing the carjacking, robbery, and attempted carjacking, Lynch immediately fled the scene in Ardiles's car, speeding and driving erratically. He obviously knew both victims had seen him; Simpson was screaming and Ardiles was attempting to pursue him on foot. He would necessarily have expected them to immediately contact police, resulting in imminent efforts by officers to find and apprehend him. Officer Talbot, at the corner of Hill and Olympic, just a few miles from the Vons, heard Lynch's car before he observed it because Lynch was travelling so fast. Talbot observed Lynch travelling at a speed of 55 to 60 miles an hour and running red lights and stop signs. Lynch was sitting very low in the car, from which the jury could infer he was attempting to avoid observation and detection. When Talbot attempted to stop Lynch, Lynch evaded him by pretending to stop, then speeding away after Talbot was off his motorcycle, additionally supporting the conclusion he was still fleeing the crime scene and attempting to avoid apprehension. The fatal crash occurred approximately five miles from the Vons, approximately eight minutes after the crimes. Nothing suggested Lynch had made any stops or reached a place of safety during his brief trip from the Vons to the accident site. Jurors could readily infer from the foregoing evidence that Lynch was still fleeing the crime scene. Indeed, any other conclusion would have been difficult to square with the evidence.

Lynch argues that the evidence established he had reached a place of temporary safety before the accident, and therefore the crimes at Vons and the fatal accident were

not part of a continuous transaction. He urges that the accident occurred "a substantial distance" from the Vons; police had not followed him from the Vons; and police were not looking for the stolen car, as it had not yet been reported stolen.[3] But based on the foregoing authorities, none of these circumstances compels a finding, as a matter of law, that Lynch had reached a place of temporary safety. Lynch's attempts to distinguish *People v. Johnson*, *supra*, 5 Cal.App.4th 552, as well as his reliance on the dissent in *People v. Russell*, *supra*, 187 Cal.App.4th 981, are not persuasive. Whether the crimes and the killing were part of a continuous transaction, and whether the defendant had reached a place of temporary safety, were questions of fact for the jury. (*People v. Russell*, *supra*, at pp. 990-991; *People v. Johnson*, *supra*, at p. 559.) As we have discussed, there was ample evidence from which the jury could have found a continuous transaction, and it was the role of the jury, not this court, to make such a determination. (*People v. Maury*, *supra*, 30 Cal.4th at p. 403; *People v. Mejia* (2007) 155 Cal.App.4th 86, 98.)

c. *Sufficient evidence supported Lynch's conviction for the robbery of Ardiles.*

Lynch next challenges the sufficiency of the evidence to support his conviction for the robbery of Ardiles's car, because "the evidence failed to show [he] had the specific intent to permanently deprive" Ardiles of the vehicle.[4] This contention is meritless.

As noted, an element of robbery is that the defendant had the specific intent to permanently deprive the victim of his or her personal property. (*People v. Burney*, *supra*, 47 Cal.4th at p. 234.) "[T]he intent required for robbery . . . is seldom established with direct evidence but instead is usually inferred from all the facts and circumstances surrounding the crime. [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 643.) The intent to permanently deprive someone of his or her property may be inferred when the

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3 Lynch's third point is factually incorrect. The car had already been reported stolen; Ardiles called 911 less than a minute after the crimes at Vons occurred.

4 Lynch concedes the evidence was sufficient to prove he intended to permanently deprive Ardiles of possession of the checks.

defendant unlawfully takes the property of another. (*People v. Morales* (1993) 19 Cal.App.4th 1383, 1391.) As Lynch recognizes, this is especially so when the taking is accomplished by means of force.

Here, Lynch took Ardiles's Corolla by force. He attempted to punch out the window, pulled Ardiles from the car, punched him in the head, and sped off in the car. He and Lynch were strangers. From these facts, a reasonable jury, using common sense, could readily infer that Lynch had the specific intent to permanently deprive Ardiles of the vehicle. Indeed, any other conclusion would have been fanciful. Lynch's discussion regarding the circumstances under which a temporary taking may constitute robbery is not germane to the issues at hand; there was no evidence from which jurors could have inferred Lynch intended only a temporary taking. Lynch took a vehicle from a stranger, by force; no evidence remotely suggested he merely intended to borrow and return it. Lynch's additional arguments—that there was no evidence he intended to change the registration or sell the car for parts, no evidence of his motive for taking the car, and no evidence showing what he planned to do with it—are unpersuasive. Such evidence is not required. The evidence was sufficient.

d. *Sufficient evidence supported Lynch's conviction for the attempted carjacking of Simpson.*

Lynch further contends the evidence was insufficient to support his conviction for the attempted carjacking of Simpson because there was insufficient evidence he intended to take the Jeep by force. The thrust of Lynch's argument appears to be that he took insufficient steps to constitute an attempt.

As noted *ante,* carjacking requires the taking of a motor vehicle accomplished by means of force or fear. (§ 215; *People v. Medina, supra,* 41 Cal.4th at p. 693.) "An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a; *People v. Medina, supra,* at pp. 693-694.) The act must exceed mere preparation and demonstrate the perpetrator is putting his or her plan into action, but it need not be the "last proximate or ultimate step toward commission of the substantive crime[,]" nor must it satisfy any

element of the crime. (*People v. Kipp* (1998) 18 Cal.4th 349, 376; *People v. Clark* (2011) 52 Cal.4th 856, 948; *People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 8.) " '[B]etween preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made.' [Citation.]" (*People v. Superior Court (Decker), supra*, at p. 8.) When the defendant's conduct is unequivocal, and "it appears the design will be carried out if not interrupted, the defendant's conduct satisfies the test for an overt act." (*Id*. at p. 13; see also *People v. Carpenter* (1997) 15 Cal.4th 312, 387 [to establish the act element of an attempted crime, the evidence must show "a direct movement after the preparation that would have accomplished the crime if not frustrated by extraneous circumstances"].)

Lynch argues that his actions of jiggling the door, unlocking the door, and placing his hand in the Jeep were insufficient as a matter of law to show he was going to take the Jeep by force. He urges that in other cases finding sufficient evidence of attempt, the defendant "did considerably more than merely reaching inside the car," such as actually sitting in the car and attempting to start it.

Lynch's argument fails. From the evidence, the jury could readily have concluded Lynch was loitering in the parking lot, searching for victims. His actions of approaching the car with Simpson inside, managing to gain access to the interior of the car, and searching for the ignition keys with his hand, were direct movements toward putting his plan into action. He continued his efforts after Simpson locked the doors in an effort to impede him, walking around to the car's partially open window and reaching through to unlock the door. The jury could readily conclude Lynch's actions amounted to more than preparation. A reasonable juror could readily have concluded that, had Lynch not been thwarted by the fact the keys were not in the car, he would have completed the carjacking. His intent to use force or fear in obtaining the car was demonstrated by his use of force on Ardiles moments after his foray into Simpson's vehicle. That evidence, coupled with the fact he paid no heed to Simpson's commands to get away, readily

suggested that, had he found the keys in the Jeep, he would have completed the carjacking of Simpson by means of force or fear. That different or stronger evidence may have been present in other cases considering the issue does not establish the evidence was insufficient here; each case must be considered on its own facts. (See *People v. Solis* (2001) 90 Cal.App.4th 1002, 1010.)

2. *Prosecution on a felony-murder theory with special circumstance allegations was not improper.*

Lynch next complains that by prosecuting him under a felony-murder theory while at the same time charging special circumstance allegations, the prosecutor violated his rights to due process. He contends that given the nature of the crime and his background, seeking a life term without the possibility of parole was not only arbitrary and capricious, but offended fundamental principles of justice. In his view, the circumstances of his case were unique, and "the prosecution's exercise of discretion . . . was fundamentally unfair." Therefore, he urges that the trial court should have sua sponte dismissed the special circumstances allegations prior to trial. Further, he contends that due process required that the prosecutor "specify the reasons" for charging both felony murder and special circumstances allegations, as well as for seeking a term of life without parole rather than 25 years to life.

Lynch's claims are unsupported by adequate authority and lack merit. Lynch concedes that the prosecutor has discretion to charge a defendant with both felony murder and special circumstances allegations based on the same facts. He cites no authority suggesting that it was impermissible to do so in the instant case, and we are aware of none. (See *People v. Abilez* (2007) 41 Cal.4th 472, 528 [double-counting charged felonies, once to elevate the degree of homicide to first degree murder, and again to render the defendant eligible for the death penalty, was permissible]; *People v. Catlin* (2001) 26 Cal.4th 81, 158 [first degree murder liability and special circumstance findings may be based upon common elements without offending the Eighth Amendment].)

Lynch correctly recognizes that prosecutorial discretion to charge a special circumstance allegation generally does not violate the federal Constitution. (See *People*

v. Tafoya (2007) 42 Cal.4th 147, 198.) It is well settled that a district attorney has broad prosecutorial discretion in charging. (*People v. Maury, supra*, 30 Cal.4th at p. 438.) "Prosecutorial discretion in charging special circumstances or seeking the death penalty is not unconstitutional. [Citation.] Intercase proportionality review is not required." (*People v. Chatman* (2006) 38 Cal.4th 344, 410.) "Vigorous prosecution is not capricious prosecution." (*People v. Edwards* (1991) 54 Cal.3d 787, 829.) Even where the death penalty is sought, "[a]bsent proof of invidious discrimination [citations] or vindictive prosecution because of a defendant's exercise of his legal rights [citation], neither of which defendant alleges in this case, 'as a general matter a defendant who has been duly convicted' " may " 'not be heard to complain on appeal of the prosecutor's exercise of discretion in charging him with special circumstances and seeking the death penalty.' " (*People v. Maury, supra,* at p. 438; *People v. Jurado* (2006) 38 Cal.4th 72, 98.) Moreover, by failing to bring a due process challenge to the charging decision below, Lynch has forfeited any claim of vindictive prosecution on appeal. (*People v. Maury, supra,* at p. 439; *People v. Ledesma* (2006) 39 Cal.4th 641, 730.)

Lynch cites no authority or persuasive argument for his contention that he received improper notice in regard to the reasons for the prosecutor's charging decisions. Indeed, Lynch acknowledges that "the case law [is] against him on this point," which he raises in order to preserve the issue for further state and federal review. We discern no constitutional violation.

3. *Lynch's sentence of life without the possibility of parole does not constitute cruel or unusual punishment.*

Lynch next urges that imposition of a sentence of life without the possibility of parole (LWOP) amounted to unconstitutionally cruel or unusual punishment because it was disproportionate to his culpability. He argues that he was 19 years old when he committed the crimes; the crimes were not particularly egregious or sophisticated; he did not have a substantial criminal record; and express malice was not shown.

First, as the People argue, Lynch has forfeited this claim by failing to raise it below. (See, e.g., *People v. Russell, supra,* 187 Cal.App.4th at p. 993.) Nonetheless, we

consider the claim " 'in the interest of judicial economy to prevent the inevitable ineffectiveness-of-counsel claim.' [Citation.]" (*Ibid.*)

A sentence violates the federal Constitution only if it is "grossly disproportionate" to the severity of the crime. (U.S. Const., 8th Amend.; *Graham v. Florida* (2010) 130 S.Ct. 2011, 2021; *People v. Blackwell* (2011) 202 Cal.App.4th 144, 158; *People v. Russell, supra,* 187 Cal.App.4th at p. 993; *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1076.) "A court must begin by comparing the gravity of the offense and the severity of the sentence. [Citation.] '[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. [Citation.] If this comparative analysis 'validate[s] an initial judgment that [the] sentence is grossly disproportionate,' the sentence is cruel and unusual." (*Graham v. Florida, supra,* at p. 2022.)

Under the California Constitution, article I, section 17, "a sentence will not be allowed to stand when it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity, considering defendant's history and the nature of the offense." (*People v. Blackwell, supra,* 202 Cal.App.4th at p. 158; *In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Haller* (2009) 174 Cal.App.4th 1080, 1092; *People v. Russell, supra,* 187 Cal.App.4th at p. 993.) "Much like Eighth Amendment analysis, we consider the nature of the offense and the offender, with particular regard to the danger each presents to society, as well as the penalties prescribed in this state for more serious offenses and those prescribed in other states for the same offense." (*People v. Blackwell, supra,* at p. 158; *People v. Haller, supra,* at p. 1092; *People v. Russell, supra,* at p. 993.)

Whether a punishment is cruel and unusual is a question of law, but we review the underlying facts in the light most favorable to the judgment. (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358.)

Lynch's sentence is undoubtedly harsh (*Graham v. Florida, supra,* 130 S.Ct. at p. 2027), but we cannot say it is grossly disproportionate or shocks the conscience in view of Lynch's crimes. Murder is generally the most serious criminal offense possible. Lynch's conduct directly resulted in an innocent man's death. The victim's death was the result of his conduct in carjacking a car from one innocent victim, and then driving with complete disregard for other persons, as he sped down the city streets and ran traffic signals. Contrary to Lynch's argument, we do not believe the nature of the offense requires a finding of disproportionality. (See *Harmelin v. Michigan* (1991) 501 U.S. 957, 961, 966 [LWOP sentence for possession of cocaine was not cruel and unusual].)

Nor does Lynch's background mitigate his culpability. He was no longer a juvenile. His criminal history was not insignificant. By the age of 19, he had sustained juvenile petitions for grand theft person and robbery, and an adult conviction for grand theft. In one of the thefts, his juvenile accomplice reportedly used a gun when confronting a customer at a taco stand; Lynch reportedly asked, " 'Why don't you go ahead and shoot him' " during the crime. He violated probation at least twice, and was on probation at the time of the instant crimes. As the probation report explained, Lynch's history demonstrated a "growing record of criminal conduct with past efforts at rehabilitation appearing to have been futile."

Lynch argues that his sentence is disproportionate because he was convicted under the felony-murder rule and there was no proof he had the intent to kill, yet his sentence is the same as if he had committed premeditated first degree murder. But a finding of disproportionality does not necessarily flow from this comparison. In *Tison v. Arizona* (1987) 481 US. 137, the defendants contended that because they had not intended to kill the victims, their death sentences were disproportionate under the Eighth Amendment. (*Id.* at p. 150; *People v. Estrada* (1995) 11 Cal.4th 568, 576.) *Tison* rejected the defendants' argument. After observing that a "critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime" (*Tison v. Arizona*, *supra*, at p. 156), the court held that "when faced with determining the level of a defendant's culpability for which the state

may exact the death penalty, focusing solely on the question of whether the defendant intended to kill the victim was unsatisfactory." (*People v. Estrada*, *supra,* at p. 576; *Tison v. Arizona*, *supra*, at p. 157.) The high court reasoned: "some nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.' " (*Tison v. Arizona*, *supra*, at p. 157; *People v. Estrada, supra,* at p. 576.) Here, Lynch may not have had the intent to kill, but he attempted to carjack one vehicle, took another, and drove with extreme reckless indifference to human life when making his getaway. Under these circumstances, his disproportionality claim fails.[5]

In light of his history and the very serious nature of his crimes, we cannot say that his LWOP sentence is disproportionate to his individual culpabilty as a matter of law. (See *People v. Blackwell, supra,* 202 Cal.App.4th at p. 159.)

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[5] Lynch does not argue that his sentence is disproportionate when compared with sentences for the same crime in different jurisdictions, and accordingly we do not address this point.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.